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State v. Olivas Appellant's Reply Brief Dckt. 39682

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Appellant,

vs.

MOSES OLIVAS, JR.,

Defendant-Respondent.

Nos. 39682, 39683

Canyon Co. Case Nos.

CR-2011-20389, CR-2008-23501

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

**HONORABLE THOMAS J. RYAN
District Judge**

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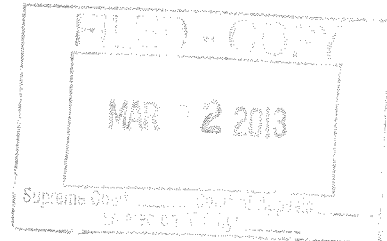


TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES	ii
ARGUMENT	1
The District Court Lacked Legal Authority To Reinstate Olivas On Probation On His Original Sentence Under Idaho Code § 18-8311	1
A. Introduction	1
B. Standard Of Review	1
C. Idaho Code § 18-8311 Precludes A District Court From Reinstating Probation On The Original Offense	1
CONCLUSION.....	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

CASES

PAGE

<u>Intermountain Gas Co. v. Industrial Indem. Co. of Idaho,</u> 125 Idaho 182, 868 P.2d 510 (Ct. App. 1994)	3
<u>Local 1494 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene,</u> 99 Idaho 630, 586 P.2d 1346 (1978)	3
<u>State v. Brown,</u> 153 Idaho 781, 291 P.3d 464 (Ct. App. 2011).....	3
<u>State v. Dorn,</u> 140 Idaho 404, 94 P.3d 709 (Ct. App. 2004)	1
<u>State v. Pena-Reyes,</u> 131 Idaho 656, 962 P.2d 1040 (1998)	2
<u>State v. Thompson,</u> 140 Idaho 796, 102 P.3d 1115 (2004).....	1
<u>State v. Toyne,</u> 151 Idaho 779, 264 P.3d 418 (Ct. App. 2011).....	2

STATUTES

I.C. § 18-8301.....	4
I.C. § 18-8302.....	4
I.C. § 18-8311.....	passim
I.C. § 19-2601.....	2

ARGUMENT

The District Court Lacked Legal Authority To Reinstate Olivas On Probation On His Original Sentence Under Idaho Code § 18-8311

A. Introduction

In 2011, while on probation for sexual abuse of a child, Olivas pleaded guilty to failure to register as a sex offender in violation of Idaho Code § 18-8311. (R., pp.160-62.) Idaho Code § 18-8311(1) requires that when a probationer violates SORA, his probation “shall be revoked and the penalty for violating this section shall be served consecutively to the original sentence.” By requiring the sentences to be served consecutively, Idaho Code § 18-8311 precludes a district court from reinstating an offender on probation for their original offense because a suspended sentence is not served. The district court, therefore, lacked legal authority to reinstate Olivas on probation on his original offense of sexual abuse of a child. The order reinstating Olivas on probation should be vacated and this case remanded for resentencing.

B. Standard Of Review

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004).

C. Idaho Code § 18-8311 Precludes A District Court From Reinstating Probation On The Original Offense

By its unambiguous terms, Idaho Code § 18-8311 does not permit a district court to reinstate an offender on probation. Rather, the statute requires that the district court

revoke probation on the original offense and impose a separate sentence for the SORA violation, and requires that the offender serve his sentence on the SORA violation “consecutively to the offender’s original sentence.” I.C. § 18-8311(1). Because reinstatement on probation is precluded by the statute, the district court violated Idaho Code § 18-8311 by reinstating Olivas on probation on his original offense of sexual abuse of a child after his period of retained jurisdiction.

In response, Olivas argues that the “district court did not violate I.C. 18-8311 when it retained jurisdiction.” (Respondent’s brief, pp.4-12.) Olivas misapprehends the state’s argument on appeal. The state has not argued that the district court is precluded under Idaho Code § 18-8311 from executing the original sentence but retaining jurisdiction for up to 365 days.¹ The state simply argues that a district court is precluded from reinstating an offender on probation by the unambiguous language of Idaho Code § 18-8311(1), which requires that the sentences “be served consecutively.”

Olivas, citing State v. Pena-Reyes, 131 Idaho 656, 962 P.2d 1040 (1998), and State v. Toyne, 151 Idaho 779, 264 P.3d 418 (Ct. App. 2011), argues that Idaho Code § 18-8311 does not create a mandatory minimum prison term. (Respondent’s brief, pp.6-8.) This argument is irrelevant. The state has not argued that the statute creates a mandatory minimum sentence. The statute’s requirement that the sentences “shall be served consecutively” requires only that the sentences be served consecutively. It does not mandate any specific amount of time of service.

¹ In fact, the state acknowledged that Idaho Code § 19-2601(4) gives the district court this very authority. (Appellant’s brief, p.8.) The state stresses, however, that retaining jurisdiction on the original offense is incompatible with the purpose of the retained jurisdiction program (evaluation in order to determine amenability to probation), because reinstatement on probation is precluded by the terms of Idaho Code § 18-8311(1).

Finally, committing the same error in both arguments, Olivas argues that nothing in Idaho Code § 18-8311 specifically precludes a court from reinstating probation or retaining jurisdiction (Respondent's brief, p.8-9), and that State v. Brown, 153 Idaho 781, 291 P.3d 464 (Ct. App. 2011), was decided incorrectly (Respondent's brief, pp.10-11). Olivas asserts that the Court in Brown "revised" Idaho Code § 18-8311 in order to "avoid the absurd result" of running Brown's SORA violation sentence concurrent to his original sentence. (Id.) Olivas misunderstands the Court of Appeals' opinion in Brown. Far from revising the statute to avoid concurrent sentences, the Court in Brown simply applied the plain language of the statute which mandates "the penalty for violating this chapter shall be served consecutively to the offender's original sentence." Brown, 153 Idaho at ____, 291 P.3d at 466.

Idaho accepts the cannon of statutory construction, *expressio unius est exclusio alterius*—where a "statute specifies certain things, the designation of such things excludes all others." Local 1494 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978) (citations omitted); see also Intermountain Gas Co. v. Industrial Indem. Co. of Idaho, 125 Idaho 182, 186, 868 P.2d 510, 514 (Ct. App. 1994) (applying rule to interpretation of insurance policy which confined coverage to negligent acts without specifically excluding intentional acts, holding that policy was only intended to provide coverage for negligent acts). Contrary to Olivas's assertions, the Court of Appeals' opinion in Brown does not revise Idaho Code § 18-8311, but instead holds that by mandating consecutive sentences the plain language of the statute necessarily precludes concurrent sentencing. Likewise, the statute's requirement that probation "shall be revoked and the penalty for violating this

section shall be served consecutively to the original sentence” necessarily precludes reinstating an offender on probation on their original offense because a *suspended* sentence is not *served*. The state requests that, as in Brown, this Court apply the literal language of the statute requiring the offender to serve his consecutive sentences.

Idaho Code § 18-8311 was adopted by the Idaho legislature as part of the “Sexual Offender Registration Notification and Community Right-to-Know Act.” I.C. § 18-8301, *et seq.* The legislature has codified its findings for this act as follows:

The legislature finds that sexual offenders present a danger and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children. Such access further provides a means for organizations that work with youth or other vulnerable populations to prevent sexual offenders from threatening those served by the organizations. Finally, public access assists the community in being observant of convicted sexual offenders in order to prevent them from recommitting sexual crimes. Therefore, this state’s policy is to assist efforts of local law enforcement agencies to protect communities by requiring sexual offenders to register with local law enforcement agencies and to make certain information about sexual offenders available to the public as provided in this chapter.

I.C. § 18-8302. Because sexual offenders present a significant risk, failure to register is a significant offense for which the legislature intended a significant consequence.

The language of Idaho Code § 18-8311(1) is clear and unambiguous: “If the offender is on probation ... at the time of the violation, the probation ... shall be revoked and the penalty for violating this chapter shall be served consecutively to the offender’s original sentence.” The statute expressly mandates that the sentences “shall be served

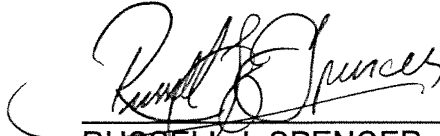
consecutively.” The sentences cannot be served consecutively unless each is actually served. Suspending the original sentence and reinstating the offender on probation is not serving the original sentence. Idaho Code § 18-8311, therefore, does not permit a district judge to reinstate probation on the original sentence.²

By reinstating Olivas on probation on his original offense of sexual abuse of a child, the district court violated Idaho Code § 18-8311. The district court’s order reinstating probation should be vacated and this case remanded for resentencing.

CONCLUSION

The state respectfully requests that this Court reverse the district court’s order reinstating Olivas on probation and remand this case for resentencing.

DATED this 22nd day of March, 2013.

A handwritten signature in black ink, appearing to read "Russell J. Spencer", is written over a horizontal line.

RUSSELL J. SPENCER
Deputy Attorney General

² While Idaho Code § 18-8311 reduces the district court’s sentencing discretion by not allowing it to reinstate an offender on probation, the state is not arguing that the statute entirely eliminates the court’s sentencing discretion. In this case, the state does not take a position as to whether a district court could reduce the original sentence, commute the original sentence, or execute the original sentence as indeterminate time only, thus making the offender immediately eligible for parole. The state only argues, consistent with the plain, unambiguous language of the statute that the sentences “shall be served consecutively,” that Idaho Code § 18-8311 does not permit a district court to reinstate probation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of March, 2013, served a true and correct copy of the attached REPLY BRIEF OF APPELLANT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

A handwritten signature in black ink, appearing to read "Russell J. Spencer", is written over a horizontal line.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm